Office - Supreme Court, U.
FILED
OCT 21 1982
ALEXANDER L. STEVAS
CLERK

No. 82-354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

* *Counsel of Record*

October 21, 1982

[Additional Counsel Listed on Inside Cover]

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice Presid[illegible]nd
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PENNA
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

TABLE OF AUTHORITIES

Cases:	Page
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	1
Malat v. Riddell, 383 U.S. 569 (1966)	5
Pacific Legal Foundation v. DOT, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979)	5
Statutes:	
15 U.S.C. § 1410b(b)(1)	6
Miscellaneous:	
NHTSA—Authorization and Oversight: Hearings on H.R. 2585 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (1979)	7
Transcript of Broadcast of "Good Morning America," June 5, 1980 (prepared by Radio/TV Reports, Inc.)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-354

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

The heart of the opposition to certiorari review in this case is the respondents' contention that the court below simply applied "the typical *Overton Park* formulation" for judicial review of agency action. NAII Opp. 6. *See also* State Farm Opp. 9; N.Y. Opp. 2. In fact, the court of appeals found the appropriate scope of judicial review to be "the most troublesome question in this case." App. 25a. The court stated this question to be apparently of "first impression" (*id.*), and deemed it worthy of a 25-page analysis. The court's unprecedented answer completely transformed the traditional scope of review of predictive agency judgments as to whether a prospective regulation would produce benefits justifying its implementation. The rule of law expounded by the court was not simply a "theoretica[l]" exercise (State Farm Opp.

8); it was vital to the court's decision. If left unreviewed, it will critically affect the agency's actions on remand in this case. It will also raise a substantial legal barrier against any deregulatory initiative by any regulatory agency.

1. Respondents' argument that the court of appeals applied the "traditional" arbitrary and capricious standard of review ignores what the court unequivocally held.[1] In the five-page portion of its opinion rejecting NHTSA's decision to rescind the passive restraint requirement (App. 50a-54a), the court focused exclusively on the third of three agency "findings"—that NHTSA " 'cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase.' "[2] The court's treatment of this finding cannot be written off as "selected pieces of verbiage" (NAII Opp. 7) or innocuous "phraseology" (State Farm Opp. 13-14). It formed the core of the court's disagreement with NHTSA concerning the appropriate course of action when an agency is uncertain about whether a prospective regulation will produce the desired benefits. As the court explained:

---

[1] Respondents contradict their own "traditional" argument. NAII argues that congressional failure to rescind the prospective passive restraint provisions of Standard 208 was "[s]urely . . . relevant to the question of whether the agency's decision was arbitrary and capricious." In NAII's view, it was proper for the court below to "conclud[e] that these legislative developments necessarily affected NHTSA's burden of explanation." NAII Opp. 8, 10. Like the court of appeals, NAII provides no prior authority for this unprecedented notion that a court's own view of subsequent legislative actions that fall short of becoming law may be used to determine whether an agency decision—concededly within the discretion allowed by its governing statute—is "arbitrary" or "capricious."

[2] App. 50a. The first two agency findings cited by the court were that (1) most manufacturers planned to use *detachable* passive belts and (2) that once detached a detachable belt " 'becomes identical to a manual belt.' " *Id.* Much of respondents' efforts are directed at challenging these findings, even though the court upheld both findings as "reasonable." *Id.*

> "The rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up.
>
> "In taking this third step, NHTSA turned the question on its head and thus totally misdirected its analysis. *There may well be 'substantial uncertainty' about the seatbelt usage rates that can be predicted if detachable belts are widely used. But the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not.* NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so. . . . To state this point in the reverse, it would be unreasonable for an agency to promulgate a regulation simply because of 'substantial uncertainty' that the status quo was any better." App. 51a (emphasis supplied).

The court thus placed on the agency the burden of disproving that the passive restraint requirement would produce the benefits previously predicted. The court deprived the agency of any discretion to rescind a prospective regulation when changed circumstances create "substantial uncertainty" as to whether earlier predictions of its benefits will actually be realized. The court, misstating what NHTSA actually found,[3] said:

---

[3] In this and other portions of its opinion, the court inaccurately referred to NHTSA's position as a finding that passive restraints would in fact fail to increase seatbelt usage by 13 percentage points. *See* MVMA Pet. 10 n.17. As the court's holding quoted above makes clear, the agency never so found. Instead, it concluded:

> "Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase." App. 104a.

The court of appeals imposed a standard of review under which NHTSA's uncertainty about realizing the increase in usage rates that would be necessary to justify the standard was not a sufficient

> "There is not one iota of evidence to support NHTSA's conclusion that Modified Standard 208 as written will fail to increase nationwide seatbelt use by 13 percentage points or more. . . . If, as NHTSA contends, the passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, then *only a well justified refusal to seek more evidence could render rescission non-arbitrary. . . . The agency did not do so; it rested its decision only on 'substantial uncertainty' about these rates. Its decision to rescind the standard thus was arbitrary because the decision was supported by no record evidence whatsoever.*" App. 51a-54a (emphasis supplied).

The court thus held that a finding it mistakenly attributed to NHTSA was arbitrary because it was unsupported by "one iota of evidence." App. 51a. Respondents argue that this language provides a "wholly independent ground" for the court's decision—the existence of a factual flaw in the agency's findings. State Farm Opp. 13; *See* NAII Opp. 2.[4] However, the court's critical holding quoted above makes clear that the real dispute here was one of fundamental policy. The court accepted that "substantial uncertainty" as to the effectiveness of a prospective standard is sufficient to justify not issuing the regulation in the first instance (App. 51a), but found the same uncertainty insufficient to rescind a prospective reg-

---

basis for withdrawing a requirement that imposed substantial regulatory burdens.

[4] NAII also suggests that the court below "simply found . . . no rational basis for a degree of uncertainty sufficient to support rescission." NAII Opp. 8. NAII cites to no such finding by the court of appeals, and there is none. In fact, the court held that *no* degree of uncertainty could have justified rescission. Although the court did characterize NHTSA's reasons for refusing to extrapolate from the available data on usage rates of passive belts as "extremely weak" (App. 52a n.30), it did not premise its decision on this ground. The court illustrated the kinds of evidence upon which it was insisting—affirmative evidence that detachable belts would *not* experience a significant growth in usage rates. App. 53a.

ulation once it is issued, even though circumstances have changed and the regulation has not yet taken effect.

This is not a dispute about failure of proof; it is a dispute about the principle that must be proven. The agency was faced with the necessity of predicting the future effectiveness of a prospective standard in the face of substantial changes in circumstances between 1977 and 1981. State Farm is quite correct when it states that the issue is not "whether regulation or deregulation is a more blessed state of being." State Farm Opp. 16. The issue is whether, when it becomes clear that the prospective effects of regulation are uncertain, the governing statute leaves the agency with discretion to rescind.

2. To the extent they do not distort the court's holding on this critical issue,[5] respondents would sidestep it, and seek to substitute their own rationale for ruling it arbitrary and capricious to rescind the passive restraint standard. *See* State Farm Opp. 16-24; NAII Opp. 11-15. This rationale rests on the erroneous contention that there really is no "substantial uncertainty" after all—even though the court of appeals conceded "[t]here may well be" such uncertainty. App. 51a. These petitions, of course, must be decided on the basis of the rule announced by the court below, and not on the basis of what the court might have held but did not. *Malat v. Riddell*, 383 U.S. 569, 572 (1966). But respondents' alternative arguments are so highly misleading that they must be corrected.

---

[5] State Farm suggests that all the court of appeals required of NHTSA was a duty "to explain its departure from prior norms." State Farm Opp. 14-15. Of course, it was Secretary Adams' 1977 decision that was the departure from prior norms. *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979); *see* MVMA Pet. 5-6. But here NHTSA *did* explain why it was rescinding the Adams order: because that order was based upon presumptions about the nature of passive restraints that could no longer be viewed as valid, presumptions that went to the heart of the critical issue of usage rates. *See id.* at 6-9. The court demanded far more than a rational explanation by NHTSA, because it rejected an explanation in 1981 that it expressly admitted it would have upheld in 1977. *See* App. 51a.

(a) Respondents argue that experience with passive belts now in the vehicle population shows a high usage rate. State Farm Opp. 20. However, the "technology *already in use*" (*id.* at 8, 14, 20) (emphasis in original) in the absence of a mandatory passive restraint standard is vastly different from the technology that NHTSA found manufacturers were planning to use to comply with the standard or that they could have been required to use under the statute.[6] Approximately 96% of these "in use" systems are belts equipped with ignition interlocks.[7] Experience with systems including ignition interlocks "already on the road" (State Farm Opp. 19) is of little or no relevance to any passive restraint standard, since Congress has forbidden NHTSA to require interlocks. 15 U.S.C. § 1410b(b)(1) (reprinted at App. 167a). Primarily for this reason, NHTSA concluded that the data on usage of systems with interlocks—which the court of appeals described as "arguably the most coercive belt system imaginable" (App. 18a n.12)—did not resolve the "substantial uncertainty" about usage rates for the non-coercive detachable belt systems manufacturers planned to use. *See* App. 98a-99a, 102a, 104a.[8]

---

[6] NAII mis-described the passive belt system that most manufacturers planned to use had the passive restraint requirement remained in effect. They referred to it as a "GM-type" belt that "[o]nce detached by the emergency release mechanism . . . can be pushed aside but remains loose and obtrusive." NAII Opp. 12 n.14. As the agency made clear, these designs had been replaced by "easily detachable" passive belts, some of which could be detached and permanently stowed "as readily as the current manual lap and shoulder belts." App. 98a. The court of appeals understood this critical difference, even if respondents do not. *See* note 2 *supra*.

[7] This 96% figure may be calculated from the record data cited by the court. App. 18a n.12.

[8] Two other types of passive belts—both with a coercive or use-compelling design—had been installed in vehicles before NHTSA's rescission order. One very costly type was confined to a Toyota line of vehicles, and there were no statistically valid data on usage rates for this system. J.A. 85 (final regulatory impact analysis). Some 1980 Chevettes had a similar "spool release" design, but be-

(b) Respondents' pretense that there is no uncertainty about future usage rates also underlies their insistence that the agency should have permitted the passive restraint requirement to take effect in order to save thousands of lives and prevent millions of serious injuries. NAII Opp. 3, 14-15; State Farm Opp. 5, 18. Petitioners join with respondents in deploring the tragic human loss that could be avoided if motorists simply buckled up the effective "active" belts now required and available in all passenger cars. But respondents' claims that these tragedies would be mitigated had the agency not rescinded the passive restraint portion of Standard 208 assume that a substantial future increase in restraint system usage would result—a conclusion that the agency found it could not make.

(c) Respondents further confuse the issue by trying to pin NHTSA's uncertainty about usage rates on a purported "threa[t]" by manufacturers "to meet the standard by using an entirely new, 'detachable' automatic belt." State Farm Opp. 18. There is nothing "new" about detachable passive belts; far from being an "eleventh hour industry" design (*id.* at 19), they were required by NHTSA for emergency egress purposes as long ago as 1974.[9] Indeed, in 1979 Administrator Claybrook recognized the conforming nature and important advantages of the noncoercive detachable belt:

> "There is a button that can release and disconnect it. That is important for exit purposes in emergency situations. As I understand, what is done is they release that button and disconnect the belt." [10]

---

cause of public distaste for that system less than 13,000 of 415,000 Chevettes sold were purchased with this system (J.A. 403), despite a variety of special efforts by GM to promote their sale. J.A. 1448.

[9] *See* MVMA Pet. 4 n.7. After 1978, NHTSA did allow use of a spool release system as well as detachable systems. *Id.* As noted above, however, relatively few such systems have ever been sold because of their unpopularity with car buyers.

[10] *NHTSA—Authorization and Oversight: Hearings on H.R. 2585 Before the Subcomm. on Consumer Protection and Finance of the*

Neither the agency nor the court of appeals characterized the manufacturers' plans to continue to use detachable belts as a "threat." Those plans simply reflected the intense market competition in a situation in which consumers have a choice between one new car with a disliked feature (coercive passive belts) and another with a preferred feature (detachable passive belts).[11] The "substantial uncertainty" voiced by the agency and recognized by the court of appeals was based on nothing "new" at all.[12]

House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 13 (1979). Claybrook said much the same thing a year later, describing the passive belt as one that "can be disconnected, you unhook it just the way you unhook anything else." Tr. of Broadcast of "Good Morning America," June 5, 1980 (prepared by Radio/TV Reports, Inc.).

[11] *See, e.g.*, J.A. 1429, 1433 (rulemaking comments of General Motors). In characterizing these plans to continue with detachable belts as a "threat," State Farm goes so far as to reargue that manufacturers might actually have switched over to nondetachable belt systems had NHTSA implemented the passive restraint requirements. State Farm Opp. 23. The court, however, upheld the agency's contrary finding. App. 50a.

[12] Like two members of the court of appeals, respondents suggest that NHTSA should have solved its uncertainty about usage rates by mandating nondetachability. NAII argues that NHTSA "could simply have announced that the [detachable] belt" long contemplated by Standard 208 and designed by the manufacturers "did not meet the standard." NAII Opp. 10. State Farm apparently recognizes the serious due process problems posed by such a cavalier approach, but argues that these problems no longer exist because NHTSA did not raise them. State Farm Opp. 19 n.7. This view is patently absurd: certainly the manufacturers' right to challenge an unlawful standard would not be circumscribed by any agency failure to recognize the illegality.

In any event, contrary to respondents' suggestions, the agency *did* consider the alternative of mandating nondetachable belts. It decided against doing so, both because of its established concern for ensuring emergency egress, and because of an apprehension by the public (rational or not) "that they could be trapped by the seat belt after a crash" (App. 110a)—concerns well documented by the administrative record. *E.g.*, J.A. 2364-79, 2485-92 (need for egress); 1651, 1665, 1679-80, 1703, 2260 (fear of entrapment).

3. Respondents assert that petitioners are "presumptuou[s]" in seeking review of the court's August 4 order setting a September 1983 effective date, because the court was doing petitioners a favor. State Farm Opp. 26. *See also* NAII Opp. 11; N.Y. Opp. 4.[13] This argument fails to deal with the unprecedented usurpation of the agency's primary jurisdiction inherent in the court's decision to set *any* effective date at all. *See* U.S. Pet. 27-28. That action should not go unreviewed by this Court.

CONCLUSION

For the reasons stated above and in their petition, petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

---

[13] In fact, the court *sua sponte* ordered petitioners to meet an effective date that it had itself concluded on June 1 was impracticable. *See* App. 71a-72a. Far from being a stay of effective date with respect to small cars—an estimated 41% of new car fleets (App. 151a)—the court's order reimposed the original effective date for these cars, despite the fact that the standard had been rescinded from December 1981 to August 1982. *See* App. 86a.

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

October 21, 1982

MILTON D. ANDREWS
RICHARD A. PENNA
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.